

<sup>2</sup> The Board notes that, following the May 4, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

2020 because he continued to receive wage-loss compensation following his return to work; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On August 20, 2014 appellant, then a 38-year-old letter carrier filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hand, wrist, and feet conditions due to factors of his federal employment, including repetitively carrying a mail satchel on his shoulders over an 11-year period weighing 20 to 50 pounds. He stopped work on June 4, 2014 and returned on August 22, 2014. On October 26, 2015 OWCP accepted the claim for bilateral ulnar nerve lesion, bilateral upper limb medial nerve other lesions, and plantar fascial fibromatosis. It paid appellant wage-loss compensation on the supplemental rolls from December 4, 2015 through November 12, 2016, on the periodic rolls from November 13, 2016 through March 4, 2017, on the supplemental rolls from March 5, 2017 through September 14, 2019, and again on the periodic rolls from September 15, 2019 through February 1, 2020.

In a letter dated September 17, 2019, OWCP outlined appellant's entitlement to compensation benefits and attached EN1032 forms instructing that, if appellant worked during any portion of the covered period, and compensation payments were received *via* either paper check or for payments sent by electronic funds transfer (EFT), he was to return the payment to OWCP even if he had already advised OWCP that he had returned to work. It noted that he was expected to monitor his EFT deposits carefully, at least every two weeks.

The record contains Request for or Notification of Absence forms from the employing establishment dated November 26, 28, 29, and 30 and December 2, 3, 4, and 6, 2019 noting "code 49 hours balance (NWA) no work available" per and management Form CA-17.

In a memorandum of telephone call (Form CA-110) dated January 31, 2020, the employing establishment advised OWCP that appellant had returned to part-time work on November 26, 2019.

Appellant returned to full-time duty on December 7, 2019.

In a letter dated January 31, 2020, OWCP noted that it had received notification that appellant had "returned to alternate work" effective November 26, 2019. It informed him that it had cancelled his periodic compensation payments effective November 26, 2019. OWCP also indicated that a final 28-day compensation payment that partially covered a period following appellant's return to work had been issued, resulting in an overpayment of compensation.

In an internal memorandum dated March 2, 2020, OWCP noted that appellant was paid \$3,443.58 every 28 days on the periodic rolls during the period November 10, 2019 through January 4, 2020, and \$3,428.44 from January 5 through February 1, 2020. It found that he was entitled to \$1,145.94 for partial wage-loss compensation for the period November 26 through December 6, 2019. OWCP further noted that appellant claimed 50 hours of intermittent wage-loss during the period November 26 through December 6, 2019 when work within his restrictions was not available. During the period November 26, 2019 through February 1, 2020, it calculated that

he had been paid \$8,333.55 on the periodic rolls and that he had been entitled to \$1,145.94, resulting in an overpayment of \$7,187.61.

In the internal memorandum dated March 2, 2020, OWCP noted that appellant was entitled to \$1,145.94 of wage-loss compensation for 6.00 hours of disability on November 26, 2019, 8.00 hours of disability on November 28, 2019, 6.00 hours of disability on November 29, 2019, 6.00 hours of disability on November 30, 2019, 5.00 hours of disability on December 2, 2019, 5.50 hours of disability on December 3, 2019, 8.00 hours of disability on December 4, 2019, and 5.50 hours of disability on December 6, 2019.

On March 10, 2020 OWCP advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$7,187.61 for the period November 26, 2019 through February 1, 2020 because he returned to work on November 26, 2019, but continued to receive wage-loss compensation benefits. It noted that, for the period November 26, 2019 through January 4, 2020, he received an overpayment in the amount of \$4,905.11 and during the period January 5 through February 1, 2020, he was overpaid \$3,428.44, resulting in a total overpayment of \$8,333.55. OWCP noted that appellant worked part time during the period November 26 to December 6, 2019 and claimed 50 hours of wage loss during this period. It found that he was entitled to \$1,145.94 during this period and subtracted this amount from the overpayment of \$8,333.55, resulting in a total overpayment of \$7,187.61. OWCP calculated this amount by dividing the gross amount that appellant had received from November 26, 2019 through January 4, 2020 of \$3,433.58 by 28 days, which it multiplied by 40 days to find an overpayment of \$4,905.11. For the period January 5 through February 1 2020, it divided the gross amount of \$3,428.44 by 28 days and then multiplied by 28 days, which equaled \$3,428.44. Next, OWCP noted that appellant worked part time for the period November 26 through December 6, 2019 and claimed 50 hours of wage loss. It found a weekly rate of \$916.75, which it multiplied by 50 hours and then divided by 40 hours, resulting in an entitlement to wage-loss compensation of \$1,145.94. OWCP also made a preliminary finding that appellant was at fault in the creation of the overpayment because he had accepted a payment that he knew or reasonably should have known was incorrect. It informed him that he had the right to submit evidence or argument if he disagreed with its finding. OWCP also provided an overpayment action request form and informed appellant that he had a right to a precoupment hearing before an OWCP hearing representative. It requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

On a completed Form OWCP-20 dated April 5, 2020, appellant requested a decision on the record. He asserted that he was without fault in the creation of the overpayment as he had notified OWCP on December 30, 2019 and January 9 and 30, 2020 that he had returned to work on November 26, 2019. Appellant requested waiver of recovery of the overpayment due to financial hardship. He also stated that at the time he returned to work that he had not fully recovered from his employment injury. Appellant listed \$4,734.45 in monthly income. Monthly expenses of \$2,701.43 and monthly installment payments totaling \$922.47. Appellant listed assets of \$27.00 in cash on hand, \$136.87 in a checking account, and \$98.21 in a savings account, which resulted in total assets of \$262.08.

On May 4, 2020 OWCP finalized the preliminary determination that appellant had received an overpayment of compensation in the amount of \$7,187.61 for the period November 26, 2019

through February 1, 2020. It denied waiver of recovery of the overpayment as it found that he was with fault in the creation of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>3</sup>

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.<sup>4</sup> Section 10.500 of OWCP's regulations provides that compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>5</sup> A claimant is not entitled to receive temporary total disability (TTD) benefits and actual earnings for the same time period.<sup>6</sup> OWCP procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation for TTD.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received a \$7,187.61 overpayment of compensation for the period November 26, 2019 through February 1, 2020 because he continued to receive wage-loss compensation following his return to work.

OWCP found that appellant received an overpayment of compensation because he continued to receive wage-loss compensation from November 26, 2019 through February 1, 2020 after he returned to part-time work on November 26, 2019 and then to full-time work on December 7, 2019. Appellant does not dispute, and the evidence supports, that he returned to work on November 26, 2019 in the sedentary position of supervisor, but continued to receive wage-loss compensation through February 1, 2020. As noted above, a claimant is not entitled to receive compensation for total disability during a period in which he or she had actual earnings.<sup>8</sup>

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8116(a).

<sup>5</sup> 20 C.F.R. § 10.500(a).

<sup>6</sup> See *M.C.*, Docket No. 19-1263 (issued March 5, 2020); *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *L.S.*, 59 ECAB 350, 352-53 (2008).

<sup>7</sup> *A.H.*, Docket No. 20-0442 (issued January 26, 2021); *C.A.*, Docket No. 18-0092 (issued April 2, 2018); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.200.1 (September 2018).

<sup>8</sup> *Supra* notes 5 and 6.

The Board further finds that OWCP properly determined the amount of the overpayment. OWCP found that for the period November 26, 2019 through January 4, 2020 appellant was overpaid \$4,905.11 and for the period January 4 through February 1, 2020, he received an overpayment of \$3,428.44. It calculated the amount by dividing the gross amount that appellant had received from November 26, 2019 through January 4, 2020 of \$3,433.58 by 28 days, which it multiplied by 40 days to find an overpayment of \$4,905.11. For the period January 5, through February 1, 2020, OWCP divided the gross amount of \$3,428.44 by 28 days and then multiplied by 28 days, which equaled \$3,428.44. Next, it noted that appellant worked part time for the period November through December 6, 2019 and claimed 50.00 hours of wage loss. OWCP found a weekly rate of \$916.75 which it multiplied by 50.00 hours and then divided by 40 hours, resulting in an entitlement to wage-loss compensation of \$1,145.94. It subtracted \$1,145.94 from \$8,333.45 and calculated that appellant received an overpayment of compensation in the amount of \$7,187.61. The Board has reviewed these calculations and finds that OWCP properly determined that an overpayment was created in the amount of \$7,187.61.

### **LEGAL PRECEDENT -- ISSUE 2**

5 U.S.C. § 8129(b) provides: “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.” A claimant who is at fault in the creation of the overpayment is not entitled to waiver.<sup>9</sup> On the issue of fault 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.<sup>10</sup>

With respect to whether an individual is without fault, OWCP’s regulations at 20 C.F.R. § 10.433(b) provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.

The Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault the first or second time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment may lack the requisite knowledge.<sup>11</sup> The Board has also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from OWCP or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the

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<sup>9</sup> *E.B.*, Docket No. 19-1571 (issued December 31, 2020); *see C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

<sup>10</sup> 20 C.F.R. § 10.433(a).

<sup>11</sup> *See A.B.*, Docket No. 18-0922 (issued January 3, 2019); *V.S.*, Docket No. 13-1278 (issued October 23, 2013); *Tammy Craven*, 57 ECAB 689 (2006).

payments subsequently deposited.<sup>12</sup> Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation for the period January 5 to February 1, 2020, thereby precluding waiver of recovery of the overpayment for this period. However, OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation for the period November 26, 2019 through January 4, 2020.

OWCP found that appellant was at fault in the creation of the overpayment because he accepted payments he knew or should have known to be incorrect after he returned to work on November 26, 2019. The Board finds, however, that OWCP failed to establish that, at the time he accepted the first two EFTs of compensation covering the period of the overpayment from November 26, 2019 through January 4, 2020, he knew or should have known the payments were incorrect.

Appellant received compensation by direct deposit payments every 28 days. He initially returned to part-time work on November 26, 2019 and remained entitled to partial wage-loss compensation. The Board also notes that OWCP did not inform appellant of the possible overpayment until January 31, 2020. The evidence of record does not establish that, as of the first and second direct deposits of compensation, he knew or should have reasonably known that he was accepting payments containing monies to which he was not entitled. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time he received the direct deposits from OWCP on December 7, 2019 and January 4, 2020, collectively covering the period of the overpayment from November 26, 2019 through January 4, 2020, that a portion of the payment was incorrect, or that a reasonable period of time passed during which he could have reviewed bank statements or been informed of the incorrect payments. The Board notes that in a number of direct deposit cases the Board has only found the claimant without fault with respect to the period covered by the first direct deposit.<sup>13</sup> However, the particular facts of the present case dictate that appellant be found without fault with respect to the period covered by the first and second direct deposits.<sup>14</sup> The first direct deposit (received on December 7, 2019) only contained partial improper monies paid for a short period November 26 through December 7, 2019. Although the second direct deposit (received on January 4, 2020) covered 28 days of compensation paid for temporary total disability during the period December 8, 2019 through January 4, 2020, OWCP also failed to show that appellant knew or should have

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<sup>12</sup> See *C.H.*, Docket No. 19-1470 (issued January 24, 2020).

<sup>13</sup> *P.B.*, Docket No. 19-0329 (issued December 31, 2019); see *C.G.*, Docket No. 15-0701 (issued December 9, 2015); see also *William E. McCarty*, 54 ECAB 525 (2003).

<sup>14</sup> Appellant received a direct deposit on December 7, 2019, covering the period November 10 through December 7, 2019, he received a second direct deposit on January 4, 2020 covering the period December 8, 2019 through January 4, 2020, he received a third direct deposit on February 1, 2020 covering the period January 5 through February 1, 2020.

reasonably known that this payment was improper, either through documentation from OWCP or through the passage of time.

Even though OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.<sup>15</sup> In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP and/or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.<sup>16</sup>

By the time appellant received the compensation payment electronically transferred on February 1, 2020 (covering the period January 5 through February 1, 2020), he knew or should have reasonably known both that he was not entitled to receive compensation for temporary total disability and that the February 1, 2020 compensation payment contained monies to which he was not entitled. The Board notes that enough time had passed since his return to work on November 26, 2019 with a concurrent opportunity of discovery that he realized or should have reasonably realized that the February 1, 2020 payment contained monies to which he was not entitled. Because he accepted a payment which appellant knew or should have known to be incorrect for the period January 5 through February 1, 2020, the Board finds that he is not entitled to waiver of recovery of the portion of the overpayment created during this period.<sup>17</sup>

Accordingly, the Board will affirm the finding of fault for the remaining January 5 through February 1, 2020 period of overpayment, thereby precluding waiver of recovery of the overpayment for this period. The Board will set aside the May 4, 2020 decision regarding the issue of fault as to the December 7, 2019 and January 4, 2020 direct deposits covering the period November 26, 2019 through January 4, 2020 and will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery for the portion of the overpayment covering the period November 26, 2019 through January 4, 2020.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$7,187.61 for the period November 26, 2019 through February 1, 2020. The Board further finds that he was at fault in the creation of the overpayment for the period January 5 through February 1, 2020, and that he was without fault in the creation of the overpayment for the period November 26, 2019 through January 4, 2020. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period November 26, 2019 through January 4, 2020.

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<sup>15</sup> *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *see C.G.*, Docket No. 15-0701 (issued December 9, 2015); *see also William E. McCarty*, 54 ECAB 525 (2003).

<sup>16</sup> *P.B.*, *id.*; *see also E.B.*, Docket No. 19-1571 (issued December 31, 2020).

<sup>17</sup> *See V.S.*, *supra* note 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** May 4, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 3, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board